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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

09 CR 813 (DLC)

5 NAHEEM CLARK,

6 Defendant.

7 -----x

8 New York, N.Y.
9 September 17, 2014
11:15 a.m.

10 Before:

11 HON. DENISE COTE,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
Southern District of New York

17 AMANDA KRAMER

Assistant United States Attorney

18 FASULO SHALLEY & DiMAGGIO

Attorneys for Defendant

19 MARGARET SHALLEY

20 ALSO PRESENT: U.S. Probation Officer Theresa Maisano

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1 THE DEPUTY CLERK: United States of America v. Naheem
2 Clark. Is the government ready to proceed?

3 MS. KRAMER: Yes. Good morning, your Honor. Amanda
4 Kramer for the government. Joining me at counsel table is
5 Theresa Maisano, a senior U.S. probation officer in this
6 district, and with the Court's permission, Samantha Oakes, an
7 intern with the United States attorney's office.

8 THE COURT: Thank you.

9 THE DEPUTY CLERK: For defendant Clark, are you ready
10 to proceed?

11 MS. SHALLEY: Yes, your Honor. Margaret Shalley for
12 Naheem Clark. Good morning.

13 THE COURT: Good morning. Ms. Shalley, have you and
14 your client both read the presentence report?

15 MS. SHALLEY: The original -- you mean the
16 specifications?

17 THE COURT: I shouldn't say the presentence report. I
18 should say I think the most recent one is the March 20, 2013,
19 probation department report.

20 MS. SHALLEY: Yes.

21 THE COURT: Thank you very much. And I have received
22 certain submissions in connection with this sentencing
23 proceeding. I have the defendant's memorandum of September 8
24 with a request that that be filed under seal. And I think,
25 actually, it shouldn't be entirely. I think there is very

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1 limited reference to the defendant's cooperation.

2 MS. SHALLEY: Judge, do you want me to file it on
3 Pacer and just take out the lines related to his --

4 THE COURT: Yes. You can file it in redacted form as
5 permitted by our local ECF rules.

6 MS. SHALLEY: Okay.

7 THE COURT: And just give Ms. Rojas the complete pages
8 for which redactions were taken, and we'll file that under
9 seal.

10 MS. SHALLEY: Thank you.

11 THE COURT: I have a letter from the defendant which
12 we received yesterday and docketed to give notice to the
13 parties. And I understand from my deputy that both attorneys
14 have reviewed the defendant's letter which is dated
15 September 11, but was received by us on the 16th and docketed
16 on the 16th. And then I have a letter from Ms. Kramer,
17 one-page letter of September 15.

18 As I remember from the time of the allocution, the
19 probation department is no longer recommending a sentence at
20 the high end of the guidelines range of 46 months, but instead
21 is recommending a sentence within the guidelines range which is
22 37 to 46 months. Is that true, Ms. Kramer?

23 MS. KRAMER: Yes, your Honor, that is correct.

24 THE COURT: Is that the government's recommendation as
25 well?

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1 MS. KRAMER: Yes, your Honor. The government notes
2 that the defendant may be sentenced up to five years under the
3 statute, and the guidelines range is 37 to 46 months.

4 In order to recommend a sentence other than a sentence
5 within the guidelines range, every AUSA would need to seek
6 approval to do that. I did not do that in this case, and
7 intended to simply seek a sentence within the guidelines range.

8 And I have some hesitation about that after reviewing
9 the defendant's letter to the Court in which he makes a number
10 of statements that are contradicted by the evidence the
11 government would have offered at a hearing, had we had a
12 hearing, had he not entered a plea of guilty.

13 He seems in his letter to disclaim any responsibility
14 for participating in a conspiracy to distribute narcotics, and
15 indicates that he merely knew that there were drugs in the
16 home --

17 THE COURT: I don't think he admits that. In fact, I
18 don't see in this letter any admission that he had knowledge
19 that Mr. Cruz had drugs.

20 MS. KRAMER: I think, your Honor, your Honor is
21 correct. He says "I know Mr. Cruz to be a user of drugs and a
22 dealer of." But are you're right, your Honor. He doesn't
23 actually say he knew those specific drugs were there. He says
24 he called Mr. Cruz and then he moved his drugs. And he says "I
25 did not have a stake in Mr. Cruz's drugs."

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1 Cruz entered a guilty plea in Tioga County on May 31,
2 2013, in which during his allocution, he said "Me, Naheem, and
3 Norma Jamie, we all was aware we had the drugs.

4 "The Court: Were you in a friend's house?

5 "The Defendant: We was in a friend's house.

6 "The Court: You were at a friend's house and what happened?

7 "Cruz: We were basically staying there partying where I was
8 using some drugs, and at the same time we were also selling
9 some. We was also selling some of what I was using."

10 So, notwithstanding all of the statements in the
11 letter, I mean, there is plenty more. I represented to the
12 Court what the evidence would be at the hearing when we were
13 ready to proceed to a hearing, and the defendant entered a plea
14 of guilty to possession with intent to distribute.

15 THE COURT: Hold on one second. I don't remember your
16 description of what the evidence would have shown.

17 MS. KRAMER: I think, your Honor, it was not at the
18 plea proceeding. It was at the prior conference in the context
19 of discussing to what extent the government would be offering
20 direct proof and to what extent it would be offering some proof
21 in the form of hearsay. But, I can summarize, your Honor.

22 THE COURT: Well, I will want that on the record. I
23 will want that on the record today again.

24 But, let me just as a procedural matter find out if
25 the defendant wishes to withdraw his admission of a violation

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1 as charged in Specification One.

2 (Defendant conferring with his attorney)

3 MS. SHALLEY: No, your Honor. He does not.

4 THE COURT: Have you had enough time talk to with your
5 client about that decision to feel comfortable, Ms. Shalley, or
6 do you need more time?

7 MS. SHALLEY: I actually only was aware of the letter
8 this morning.

9 THE COURT: I think we had a break of about 20
10 minutes, and I'm happy to give you more time.

11 (Defendant conferring with his attorney)

12 THE COURT: Ms. Shalley, we're going to take a break.

13 MS. SHALLEY: Thank you.

14 THE COURT: Please, take as much time as you need.
15 This is important to the defendant to decide, and of course to
16 you as his counsel. Just let Ms. Rojas know when you'd like to
17 resume.

18 MS. SHALLEY: Thank you so much.

19 (Recess)

20 THE COURT: Ms. Shalley, on reflection, I'm wondering
21 if I shouldn't put this sentence over for a day or two to give
22 you and your client an opportunity to carefully think about
23 these issues.

24 THE DEFENDANT: Can I speak by any chance?

25 THE COURT: Consult with Ms. Shalley first.

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1 I'm just going to put this over.

2 MS. SHALLEY: I understand.

3 THE COURT: I don't want there to be any concern on
4 the defendant's part, ever, not today, not in the future, that
5 there was a need to rush for him to make a decision about these
6 issues. This is important to him. I'm going to sentence him
7 at some point here. I mean, theoretically if he did decide to
8 make a motion to withdraw, we'd play that out and I would
9 decide whether or not to give him that opportunity. And
10 theoretically there might end up being a hearing, and the
11 government would be put to its proof and it would or wouldn't
12 carry that burden. I just want to make sure that we're all
13 being careful here.

14 MS. SHALLEY: I understand.

15 MS. KRAMER: Your Honor, if I may say something for
16 the record. In the weeks leading up to the scheduled hearing
17 and ultimately the defendant's guilty plea, I believe
18 approximately one week before the hearing was to take place, I
19 engaged in numerous conversations with Ms. Shalley during which
20 she vigorously advocated for her client. I produced to her all
21 of the evidence that I intended to offer and gave her updates
22 as we got closer, including the 3500 material for all the
23 witnesses that I intended to call. And I understand from my
24 conversations with her that she went over all of that with the
25 defendant prior to his guilty plea. And she's continued to

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1 advocate vigorously for him leading up to the sentencing.

2 So, I agree completely with the Court's decision to
3 put this over so they have additional time to consult and so
4 that the defendant doesn't ever have any doubt about the
5 vigorous and dedicated representation that Ms. Shalley has
6 given to this case.

7 THE COURT: I think I'm going to ask the government to
8 put on the record a description, it doesn't have to be a
9 complete description, but a substantial description of the
10 evidence that it intended to offer at the hearing.

11 MS. KRAMER: Certainly, your Honor. First, the
12 government intended to call two law enforcement witnesses,
13 detectives from a narcotics task force in upstate New York who
14 were working on the investigation that ultimately led to this
15 defendant's arrest. One of those detectives engaged in
16 surveillance of the defendant the day of his arrest and had
17 previously conducted surveillance, seeing the defendant drive
18 the car that he was arrested driving. And in fact, only saw
19 the defendant driving that car until the day of his arrest when
20 it appeared that the defendant had noticed that he was being
21 followed by law enforcement, at which point he had the
22 passenger in the car pull over. The defendant had the
23 passenger in the car get in the driver's seat, and the
24 defendant got into the back seat and crouched down and hid
25 until the car ultimately went back to the house, apparently

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1 against the defendant's wishes, according to the testimony of
2 the driver of that car in the grand jury in Tioga County.

3 But the surveilling agent would testify that the car
4 pulled back in front of the house. The woman who was driving
5 got out, and police officers encountered the defendant hiding
6 in the back seat on the floor of the car.

7 That same detective would testify as to some of the
8 physical evidence that was found in that car. There was a
9 wallet containing fraudulent identification with the
10 defendant's photograph but another person's contact
11 information, which was a real identification document obtained
12 from South Carolina. That car also contained black rubber
13 bands in the glove compartment that were the same type of
14 rubber bands that were used to make the heroin bundles that
15 were recovered by a different detective from behind the house
16 where Clark's co-conspirator, Manuel Cruz, tried to hide the
17 drugs.

18 Another detective who did the search of the house and
19 actually found the heroin would testify that she was conducting
20 surveillance on the house, and received a call from the
21 detective who was doing surveillance of Clark's car. And she
22 received a call saying, basically, I think Clark has made us,
23 he's seen the surveillance. And very shortly thereafter,
24 Manuel Cruz jumped out of the window of the house, and tried to
25 hide a bag behind the house, and that bag was determined to

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1 contain bundles of heroin. Cruz was arrested and the house was
2 searched.

3 The same detective who did the search would testify
4 there was a bedroom that appeared to be occupied by Clark. The
5 clothes were Clark's size. They would not have fit anyone else
6 in the house. Manuel Cruz was not the same size as Clark. And
7 in that bedroom, there was a digital scale, of the type
8 commonly used by drug dealers to weigh drugs and packaging.
9 And also that is the bedroom that another witness testified in
10 the state grand jury was being occupied by Clark.

11 The government would also call one or both of the lay
12 witnesses who testified in the grand jury in the state. One of
13 them testified that she had been basically selling drugs and
14 staying at that house with Manuel Cruz and with Naheem Clark
15 for approximately one month prior to the date of the arrest.
16 And that they were all in it together selling heroin and crack
17 cocaine.

18 And the other witness was the driver of the car who
19 testified in the grand jury about the way things happened that
20 day, that they were selling drugs in her house, and she knew
21 about it, and would describe Clark basically telling her to
22 drive and to pull over that day because the police were
23 following them.

24 If the government couldn't call those witnesses
25 directly, the government would attempt to offer their testimony

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1 in the state grand jury, which was sworn testimony, through
2 another witness.

3 The government would also introduce physical evidence,
4 as we've already described, the digital scale, rubber bands,
5 and text messages that were taken from the phones that were
6 seized from Cruz and Clark the day of the arrest. Text
7 messages between the two of them evince a drug distribution
8 conspiracy. There is slang used, and the detective from Tioga
9 County could testify about the meaning of that slang. It is
10 fairly plain that it was discussion between two drug dealers
11 about their sale of drugs.

12 I think that's a fairly complete testimony, although I
13 may be leaving some things out. Oh, and as I said earlier,
14 your Honor, Manuel Cruz gave that allocution during his plea in
15 the state, and the government would attempt to offer that as
16 well.

17 THE COURT: Ms. Rojas, please give us an adjourn date
18 here.

19 THE DEPUTY CLERK: Counsel, the Court is available
20 Friday, September 19, at 3:30.

21 MS. KRAMER: Thank you very much. That works for the
22 government, your Honor.

23 MS. SHALLEY: Thank you.

24 THE COURT: The record should reflect that Ms. Rojas
25 consulted with counsel before making that announcement to get

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1 their availability. Thank you all.

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